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RICHARD W. WIEKING
CLERK, U. S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

12 ROGER SCHLAFLY) CIVIL NO. 94-20512 SW
13 Plaintiff,)
14 v.) ORDER DENYING IN PART AND
15 PUBLIC KEY PARTNERS AND RSA) GRANTING IN PART PKP'S AND
16 DATA SECURITY INC.,) RSA'S MOTIONS FOR PARTIAL
17) SUMMARY JUDGMENT ON
18 Defendants.) INTERFERENCE WITH CONTRACTUAL
19) RELATIONSHIP, UNFAIR BUSINESS
20) PRACTICES AND ANTITRUST CLAIMS
21)
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Plaintiff Roger Schlaflly, proceeding pro se, filed this action against Public Key Partners ("PKP") and RSA Data Security, Inc. ("RSA"), seeking a declaration of patent invalidity and non-infringement and alleging violations of antitrust law, interference with contractual relationship, and unfair business practices. Defendants PKP and RSA now bring motions for summary judgment on Schlaflly's antitrust, unfair

cl.

1 business practices and interference with contractual
2 relationship claims.¹

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4 **I. BACKGROUND**

5 In 1987, RSA filed a patent infringement action in the
6 U.S. District Court for the Northern District of Illinois
7 against Digital Signature and its partners, Mike Markowitz and
8 Roger Schlafly. The patent at issue covered data encryption
9 software that RSA licensed to others. Ultimately, Digital
10 Signature, Markowitz, and Schlafly entered into a consent
11 judgment in which they agreed to an injunction against their
12 making, using or selling any products implementing the patent.

13 In 1990, Markowitz joined Information Security
14 Corporation ("ISC"). Thereafter, ISC began selling Digital
15 Signature's software and in return Digital Signature (Schlafly
16 and Markowitz) received royalties on the sales. In 1993, ISC
17 entered into an agreement with AT&T permitting AT&T to license
18 and sell all of ISC's cryptographic software, and in return,
19 AT&T was obligated to pay royalties to ISC on all products
20 sold under the agreement.

21 Also in 1990, RSA and another company formed the
22 partnership of Public Key Partners ("PKP") for the purpose of
23 licensing various cryptography patents. In January of 1994,
24 PKP learned that Digital Signature's successor in interest,

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26 ¹ PKP filed a motion for partial summary judgment on Schlafly's
27 interference with contract relationship, unfair business practices and
antitrust claims. RSA joined in PKP's motion and filed a separate
motion for partial summary judgment on the antitrust claims.

1 Information Security Corp. ("ISC") was about to sell products
2 to AT&T for resale. Consequently, PKP wrote to AT&T and
3 demanded that AT&T cease distribution and marketing because
4 sale of the Digital Signature products by ISC constituted
5 patent infringement and violated the consent judgment.

6 Schlaflay objected to the letter and told PKP to refrain
7 from telling others that Schlaflay was infringing patents or
8 violating the consent decree. PKP wrote back, stating that
9 Schlaflay's letter was "defectively vague" and that Schlaflay
10 had admitted to infringing numerous patents.

11 Apparently unable to resolve the matter to his
12 satisfaction, Schlaflay filed this action in July of 1994.
13 Schlaflay's First Amended Complaint asserts the following
14 claims: (1) libel (First Cause of Action); (2) patent
15 invalidity (Second Cause of Action); (3) patent non-
16 infringement (Third Cause of Action); (4) interference with
17 contractual relationship (Fourth Cause of Action); (5) fraud
18 (Fifth Cause of Action); (6) unfair business practices (Sixth
19 Cause of Action); and (7) antitrust (Seventh Cause of Action).

20 In January of 1995, RSA moved to dismiss Schlaflay's First
21 Amended Complaint. After hearing the motion, the Court
22 dismissed Schlaflay's claims for fraud and libel, but allowed
23 Schlaflay to proceed with his claims for patent invalidity,
24 patent non-infringement, interference with contractual
25 relationship, unfair business practices and antitrust
26 violations.

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II. LEGAL STANDARD

For summary judgment, the moving party bears "the initial responsibility of informing the district court of the basis for its motion" Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The moving party must demonstrate that no genuine issue of material fact exists for trial. Id. at 322. However, the moving party is not required to negate those portions of the nonmoving party's claim on which the nonmoving party bears the burden of proof. Id.

Once the moving party demonstrates that there is no genuine issue of material fact, the nonmoving party must designate "specific facts showing that there is a genuine issue for trial." Id. at 324. The nonmoving party must "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322. There may be no genuine issue of material fact if "the evidence is of insufficient caliber or quantity to allow a rational finder of fact" to find for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986).

III. DISCUSSION

In their motions for partial summary judgment, Defendants contend that Schlafly cannot maintain his claims for interference with contract relationship, unfair business practices, or antitrust violations. For the reasons set forth below, the Court finds that Defendants are entitled to summary

1 judgment on the interference with contract relationship claim
2 but are not entitled to summary judgment on the unlawful
3 business practices and antitrust claims.

4

5 **A. Interference with Contractual Relationship**

6 In his complaint, Schlafly alleges that Defendants
7 interfered with the contract relationship of Digital Signature
8 and ISC.² The elements of a tortious interference with
9 contract relationship claim are: (1) a valid contract between
10 plaintiff and a third party; (2) defendant's knowledge of this
11 contract; (3) defendant's intentional acts designed to induce
12 a breach or disruption of the contractual relationship; (4)
13 actual breach or disruption of the contractual relationship;
14 and (5) resulting damage. Pacific Gas & Electric Co. v. Bear
15 Stearns and Co., 50 Cal. 3d. 1118, 1126, 270 Cal.Rptr. 1
16 (1990).

17 Defendants argue that Schlafly cannot proceed with his
18 claim for interference with contract relationship because he
19 cannot demonstrate any facts to support the elements of actual
20 breach and resulting damage. According to Defendants, there
21 is no evidence that PKP or RSA caused a breach or disrupted
22 the contact between ISC and Digital Signature. Further,

23

24 ² Schlafly also asserts that Defendants interfered with the
25 contract entered into by AT&T and ISC. However, Schlafly is not a
26 party to this contract and any interest Schlafly has in the
27 transactions between AT&T and ISC is derived from the contract between
ISC and Digital Signature. Thus, Schlafly, as a partner in Digital
Signature, can only recover for harm to the relationship between ISC
and Digital Signature.

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1 Defendants claim that Schlafly has failed to offer any
2 evidence that he was damaged by Defendants' actions.

3 Defendants are correct. To defeat a motion for summary
4 judgment the non-moving party must set forth sufficient
5 evidence to establish the elements which that party will bear
6 the burden of proof at trial. Celotex, 477 U.S. at 324.
7 Further, a party opposing a motion for summary judgment may
8 not rely on allegations or denials contained in the pleading,
9 but must provide facts to demonstrate there is a genuine issue
10 for trial. Anderson, 477 U.S. at 248. Here, Schlafly has not
11 provided any evidence, but instead, he makes only general
12 unsupported allegations of actual breach, disruption of the
13 contract, and resulting damage. Therefore, the Court GRANTS
14 Defendants' request for summary judgment on the claim for
15 interference with contract relationship.

16

17 B. Unfair Business Practices

18 Schlafly also contends that PKP has violated California
19 law prohibiting unfair business practices. Specifically,
20 Schlafly asserts that PKP violated Cal. Bus. & Prof. Code §§
21 17001, 17046, 17048, and 17500. In response, Defendants argue
22 that Schlafly has not provided evidence of any predicate acts
23 that could form the basis for a claim of unfair business
24 practices.³

25
26 ³ Defendants also assert that Schlafly's unfair business practice
27 claims are based upon facts alleged in claims that the Court
dismissed, and thus, cannot be relied on by Schlafly. Defendants'
argument is without merit. When the Court dismissed Schlafly's claims

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1 California's Unfair Business Practices Act prohibits
2 "unfair, dishonest, deceptive, destructive, fraudulent and
3 discriminatory practices by which fair and honest competition
4 is destroyed or prevented." Cal. Bus. & Prof. Code § 17001.
5 This language requires a complainant to allege what the
6 defendant's allegedly unlawful practices are and how they are
7 unlawful. Khoury v. Maly's of California, Inc., 14
8 Cal.App.4th 612, 619, 17 Cal.Rptr.2d 708, 712 (1993).

9 Here, the relevant inquiry is whether Schlafly has
10 provided any evidence to support his assertion that PKP
11 committed unlawful acts. Schlafly alleges that Defendants
12 deceptively exaggerated the scope of their patents, unfairly
13 negotiated with potential licensors in bad faith, fraudulently
14 promised a reasonable and nondiscriminatory licensing policy,
15 and threatened competitors.

16 On the one hand, Schlafly cannot base his unfair business
17 practices claim on allegations that Defendants unfairly
18 negotiated with potential licensors or maintained a
19 discriminatory licensing policy because he has no proof that
20 Defendants committed these unlawful acts. Although Schlafly
21 contacted PKP and received information regarding the licensing
22 of PKP's patents, he never applied to PKP for the purpose of
23 obtaining a license. Additionally, there is no evidence that
24

25 for fraud and libel it did not dismiss the underlying factual
26 allegations contained in the complaint. Although Schlafly cannot
27 maintain his claims for fraud or libel, he can incorporate the factual
allegations in the fraud and libel sections of the complaint when
asserting other claims.

1 PKP or RSA discriminated against Schlafly in their dealings
2 with him.

3 On the other hand, Schlafly has presented sufficient
4 evidence to create a genuine issue of fact regarding the
5 predicate acts of deceptively exaggerating the scope of the
6 patents and threatening competitors. Schlafly submitted the
7 letter sent by PKP to AT&T accusing ISC of violating the
8 consent judgment. Amended Complaint, Ex. D. Schlafly's also
9 offered a letter from the Commerce Department's National
10 Institute of Standards and Technology that states that a press
11 release made by RSA was potentially misleading and could be
12 interpreted as exaggerating the scope of their patents.
13 Schlafly's Opposition to Motions for Summary Judgment, Ex. DC.
14 Moreover, at this point, the scope of Defendants' patent is in
15 dispute. Until the scope of the patents is determined,
16 genuine issues of fact exist as to whether PKP or RSA
17 exaggerated the scope of their patents or unfairly threatened
18 competitors. Thus, the Court DENIES Defendants' motions for
19 summary judgment on Schlafly's unfair business practices
20 claim.

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22 **C. Antitrust**

23 Schlafly's complaint alleges several antitrust violations
24 including: (1) formation of an illegal patent pool,
25 (2) illegal tying of products, (3) advocating a secondary
26 boycott, (4) patent misuse and, (5) illegal price
27 discrimination. In response, RSA and PKP assert that Schlafly

1 does not have standing to bring an action for the antitrust
2 violations alleged in his complaint. According to Defendants,
3 because Schlafly is only a software developer and does not
4 compete with RSA in manufacturing and selling software, he
5 does not have standing to bring an antitrust action.

6 Although the federal antitrust laws contain broad
7 language in setting forth the class of persons who may sue for
8 damages under the antitrust laws, the Supreme Court has
9 limited the scope of antitrust liability by establishing the
10 doctrine of antitrust standing. Associate General
11 Contractors of California v. California State Council of
12 Carpenters, 459 U.S. 519, 534-535 (1983). This doctrine
13 requires an evaluation the plaintiff's injury, the alleged
14 wrongdoing of the defendants, and the relationship between
15 them to ascertain whether the causal connection is such that
16 the plaintiff may recover damages under the antitrust laws.
17 Id. at 535.

18 The Ninth Circuit enumerated several factors that are to
19 be considered when determining whether the plaintiff has
20 standing to sue for antitrust violations:

21 1. The specific intent of the alleged conspirators;
22 2. The directness of the injury;
23 3. The character of the damages, including risk of
24 duplicative recovery, the complexity of apportionment and
25 their speculative character;
26 4. The existence of other more appropriate plaintiffs:

5. The nature of the injury.

2 R.C. Dick Geothermal Corp. v. Thermogenics, Inc., 890 F.2d
3 139, 146 (9th Cir. 1989). No single factor is decisive. Id.
4 Instead, courts must balance the factors to determine whether
5 a plaintiff has standing. Id.

1. The Specific Intent of the Alleged Conspirators

7 Defendants contend that Schlafly has not shown that he
8 was the target of the alleged antitrust violations. According
9 to Defendants, any intent associated the alleged unlawful
10 conduct could only have been directed at other manufacturers,
11 patent licensees and RSA software purchasers. Since Schlafly
12 does not fall within one of these groups, Defendants assert
13 that Schlafly could not have been the intended recipient of
14 the anticompetitive acts.

15 Defendants argument that the alleged antitrust violations
16 could not have been directed at software developers is
17 unavailing. The intent of an antitrust violator is to prevent
18 purchasers from buying competing products. This can be
19 accomplished by preventing competing products from reaching
20 the marketplace. Here, Defendants' alleged unlawful actions
21 limited Schlafly's ability to get the software he developed to
22 the marketplace. Thus, there is sufficient evidence of
23 specific intent to harm Schlafly.

2. The Directness of the Injury

25 Defendants assert that any injury sustained by Schlafly
26 is derived from AT&T and ISC, and is therefore, indirect.
27 However, Defendants allegedly illegal, anticompetitive control

1 over their patents directly impaired Schlaflfy's ability, as an
2 independent software developer, to solicit business and
3 generate revenue. As such, Schlaflfy's injury is not derived
4 from another party, but "close in the chain of causation" to
5 the asserted unlawful conduct. R.C. Dick, 890 F.2d at 147.

6 3. The Character of the Damages

7 In determining the third factor, the plaintiff's damages
8 are evaluated to determine whether there is potential for
9 duplicative recovery or for difficulty in apportioning
10 damages. Here, Schlaflfy could recover for lost royalties that
11 he would have received if the alleged illegal activity had not
12 occurred. This would not create a risk of duplicative
13 recovery because the amount that AT&T and ISC would have paid
14 for royalties can be deducted from any potential recovery by
15 AT&T or ISC. Further, permitting Schlaflfy to recover for lost
16 royalties and manufacturers to recover for their lost profits
17 does not create any unusually difficult apportioning problems.

18 4. The Existence of More Appropriate Plaintiffs

19 Defendants claim that AT&T and ISC are more appropriate
20 plaintiffs. Accepting the antitrust allegations as true, AT&T
21 and ISC are within the class of injured parties. However,
22 AT&T and ISC are not in any better position than Schlaflfy to
23 vindicate the public interest in antitrust enforcement. Since
24 the alleged restrictions on the market directly impair
25 Schlaflfy's livelihood, he has significant incentive to seek
26 enforcement of the antitrust laws. Alternatively, AT&T's
27 limited participation in the market may not be enough to

1 induce AT&T to become enmeshed in a legal battle. Therefore,
2 if Schlafly is prevented from pursuing his claims there is a
3 danger that the alleged antitrust violations may go
4 unremedied. See Yellow Pages Cost Consultants v. GTE
5 Directories, 951 F.2d 1158, 1164 (9th Cir. 1991). Under these
6 circumstances, there are no more appropriate plaintiffs to
7 pursue antitrust claims.

8 5. The Nature of Plaintiff's Claimed Injury

9 The final factor, the nature of the injury, involves a
10 determination of whether the plaintiff suffered the type of
11 injury that Congress sought to redress in forming the
12 antitrust laws. Associate General Contractors, 459 U.S. at
13 538. A central interest of the antitrust laws is to protect
14 the economic freedom of participants in the market. Id.
15 Schlafly asserts that Defendants illegal actions restricted
16 competition and monopolized the cryptography market. As a
17 result, there is limited access for Schlafly and other
18 software developers to sell their software and services.
19 Thus, Schlafly's injury is "inextricably intertwined" with the
20 injury in the cryptography market and "falls within the area
21 of congressional concern." Id.

22 Balancing the Factors

23 In balancing the factors enumerated in R.C. Dick, it is
24 clear that Schlafly's case falls within the intended area of
25 statutory protection. Accordingly, the Court DENIES
26 Defendants' motions for summary judgment based upon antitrust
27 standing.

IV. CONCLUSION

Defendants' motion for partial summary judgment on the interference with contractual relationship claim is GRANTED. Defendants' motions for summary judgment on the unfair business practices and antitrust claims is DENIED.

IT IS SO ORDERED.

DATED: 3/23/96

SPENCER WILLIAMS
United States District Judge